STATE OF MICHIGAN

COURT OF APPEALS

PAUL FULTON, Personal Representative of the Estate of JULIE FULTON, Deceased,

Plaintiff-Appellee,

and

ATTORNEY GENERAL, DEPARTMENT OF COMMUNITY HEALTH, and BLUE CROSS BLUE SHIELD,

Intervenors,

v

PONTIAC GENERAL HOSPITAL, d/b/a NORTH OAKLAND MEDICAL CENTERS, and DR. DEBORAH MARGULES ELDRIDGE,

Defendants,

and

WILLIAM BEAUMONT HOSPITAL, DR. T. KUNTZMAN, DR. J. WATTS, and STEPHEN PETERS,

Defendants-Appellants.

FOR PUBLICATION
September 20, 2002
9:00 a.m.

No. 225174
Oakland Circuit Court
LC No. 97-545842-NH

Updated Copy
December 6, 2002

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

SMOLENSKI, J. (*dissenting*).

I respectfully dissent, because I disagree with the majority's interpretation of MCL 600.2912a(2). I would affirm the trial court's order denying defendants' motion for summary disposition.

This case requires us to interpret the language of MCL 600.2912a(2) and determine what proofs a plaintiff must present in order to state a medical malpractice claim for loss of an opportunity to survive. Plaintiff argues that the statute requires a plaintiff to show (1) the decedent had an initial opportunity to survive, before the alleged malpractice, of at least fifty percent and (2) the alleged malpractice reduced the decedent's opportunity to survive. In contrast, defendants argue that the statute requires a plaintiff to show (1) the decedent had an initial opportunity to survive, before the alleged malpractice, of at least fifty percent, (2) the alleged malpractice reduced the decedent's opportunity to survive by at least fifty percent, and (3) the alleged malpractice more probably than not caused the decedent's death.

The majority adopts defendants' argument, concluding that the statute requires a plaintiff to show a reduction of at least fifty percent in the decedent's opportunity to survive. I disagree. I would conclude that MCL 600.2912a(2) only requires a plaintiff to show that the decedent's initial opportunity to survive was greater than fifty percent and that the alleged malpractice more probably than not reduced that opportunity to survive.

I. MCL 600.2912a(2)

MCL 600.2912a(2) governs the burden of proof requirements with respect to medical malpractice actions. The statute provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. *In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.* [Emphasis added.]

In *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001), our Supreme Court explained the rules of statutory construction:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992), mod 440 Mich 1204 (1992).

The majority concludes that MCL 600.2912a(2) is ambiguous because a reasonable person could read the phrase "the opportunity," contained in the second sentence of the statute, to mean either "the plaintiff's initial opportunity to survive or achieve a better result before the

alleged malpractice" or "the plaintiff's loss of opportunity to survive or achieve a better result." *Ante* at ___. I agree that the statutory language is ambiguous and that judicial construction is therefore appropriate. However, I disagree with the majority's ultimate construction of the statute.

II. *Wickens v Oakwood Healthcare System*

In *Wickens v Oakwood Healthcare System*, 242 Mich App 385; 619 NW2d 7 (2000), rev'd in part and vacated in part 465 Mich 53; 631 NW2d 686 (2001), this Court addressed the identical legal question presented in the current case.[1] As the *Wickens* panel stated:

> The question before this Court is whether the statute allows for recovery when the initial opportunity to survive before the alleged malpractice is greater than fifty percent, as argued by plaintiffs, or, rather, if the statute only allows for recovery when the difference between the opportunity to survive before and after the alleged malpractice is greater than fifty percent, as defendants contend. [242 Mich App 390.]

After extensively analyzing the statutory language and the relevant case law, the *Wickens* panel agreed with the plaintiffs' argument, holding that MCL 600.2912a(2) "requires plaintiffs in medical malpractice actions seeking recovery for loss of an opportunity to survive or an opportunity to achieve a better result to show that, had the defendant not been negligent, there was a greater than fifty percent chance of survival or a better result." 242 Mich App 392.

On appeal from that decision, in *Wickens*, *supra*, 465 Mich 54, our Supreme Court held that "a living person may not recover for loss of an opportunity to survive."[2] The Court reached this conclusion on the basis of the language of the first sentence of the statute, which provides that a medical malpractice plaintiff "has the burden of proving that he or she suffered an injury." MCL 600.2912a(2). The Court reasoned that the statute limited a plaintiff's recovery to claims for present injuries, and did not permit claims for potential future injuries. 465 Mich 60. Therefore, the Court limited loss of opportunity to survive claims to situations where death has already occurred. *Id*. at 60-61.

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[1] The trial court in the present case decided both motions for summary disposition before either appellate court issued an opinion in *Wickens*.

[2] In the present case, plaintiff's claim for loss of an opportunity to survive does not run afoul of our Supreme Court's holding in *Wickens*. Although Fulton was alive when the original complaint was filed, she died during the pendency of the action. Plaintiff amended the complaint after Fulton's death, proceeding with the action as her personal representative. An amended pleading supersedes the former pleading. MCR 2.118(A)(4); *Grzesick v Cepela*, 237 Mich App 554, 562; 603 NW2d 809 (1999). Therefore, plaintiff may properly maintain a claim for loss of an opportunity to survive under MCL 600.2912a(2).

Because the *Wickens* plaintiff was still living, the Court held that her claim was barred, to the extent that it was based on a loss of an opportunity to survive. *Id*. at 61. Further, concluding that "it was unnecessary for the lower courts to have addressed whether plaintiff had a cause of action" based solely on her loss of an opportunity to survive, the Court vacated the portion of this Court's opinion addressing that matter. *Id*. at 62. Given this language in our Supreme Court's opinion, I agree with the majority that this Court's opinion in *Wickens* is not precedentially binding with regard to its construction of the second sentence contained in MCL 600.2912a(2). However, our Supreme Court neither approved nor disapproved of this Court's reasoning on that point. Because I would conclude that this Court's opinion in *Wickens* properly analyzed the language of MCL 600.2912a(2), I would adopt that analysis here.[3]

The majority does not find the *Wickens* panel's reasoning persuasive because that panel "did not acknowledge the ambiguity of MCL 600.2912a(2) or address the legislative intent behind the statute in reaching the conclusion that it did." *Ante* at ___. It is true that the *Wickens* panel did not specifically state whether it found the statutory language to be ambiguous. However, the panel did examine the legislative intent regarding the enactment of MCL 600.2912a(2). In fact, the *Wickens* panel examined the identical sources cited by the majority here: (1) our Supreme Court's opinion in *Falcon v Memorial Hosp*, 436 Mich 443; 462 NW2d 44 (1990), superseded by statute as stated in *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997), (2) the Legislature's subsequent adoption of the statutory language at issue here, and (3) our Supreme Court's opinion in *Weymers*.[4] See *Wickens*, *supra*, 242 Mich App 390-392. Examining those sources, the *Wickens* panel simply came to a different conclusion than the majority here.

The majority focuses on the "magnitude of the lost opportunity," *ante* at ___, as the touchstone for understanding the language of MCL 600.2912a(2) as a legislative response to our Supreme Court's decision in *Falcon*. This approach is driven by the majority's view that the "focus in *Falcon* was the 37.5 percent opportunity as it represented the lost opportunity, not as it represented the initial opportunity to survive." *Ante* at ___. However, the 37.5 percent opportunity in *Falcon* represented *both* the initial opportunity to survive *and* the reduction in the opportunity to survive. See *Falcon*, *supra* at 447-449.

I believe that *Falcon's* true focus was whether a plaintiff with less than a fifty percent initial opportunity to survive could prove that the defendants caused the plaintiff physical harm, under the traditional "more probable than not" standard of causation.[5] To resolve that question, the *Falcon* Court examined three alternative approaches to the lost opportunity doctrine: (1) the pure lost chance approach, (2) the proportional approach, and (3) the substantial possibility

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[3] See *Wickens*, *supra*, 242 Mich App 390-394.

[4] Because the *Wickens* panel looked beyond the statutory language itself, the decision implies a finding that the second sentence of MCL 600.2912a(2) is ambiguous.

[5] See *Falcon*, *supra* at 449-451.

approach. *Weymers, supra* at 650; *Wickens, supra*, 242 Mich App 391. The *Weymers* Court, in discussing *Falcon*, further explained that "[e]ach approach lowers the standard of causation, with the effect that a plaintiff is allowed to recover without establishing cause in fact." *Weymers, supra* at 650. The substantial possibility approach, adopted by the *Falcon* Court, "allows a plaintiff to recover for his injury even though it was more likely than not that he would have suffered the injury if the defendant had not been negligent." *Weymers, supra* at 651.

The Legislature adopted MCL 600.2912a(2) in response to *Falcon*. However, the statute does not prohibit medical malpractice plaintiffs from bringing claims for loss of an opportunity to survive. Rather, the statute expressly recognizes such claims, with an important restriction: a plaintiff cannot recover for loss of an opportunity to survive unless the plaintiff proves, under a more probable than not standard, that the plaintiff would not have suffered the injury in the absence of the defendant's negligence. MCL 600.2912a(2). As explained by the *Wickens* panel:

> By requiring plaintiffs in a malpractice claim to prove that "the opportunity was greater than 50%" before recovering for loss of an opportunity to survive, MCL 600.2912a(2); MSA 27A.2912(1)(2), the Legislature rejected the lost opportunity doctrine that allowed a plaintiff to recover even though it was more probable than not that the plaintiff would not have survived even if there had been no negligence. See *Weymers, supra* at 649, 651. Therefore, we agree with plaintiffs that MCL 600.2912a(2); MSA 27A.2912(1)(2), requires plaintiffs in medical malpractice actions seeking recovery for loss of an opportunity to survive or an opportunity to achieve a better result to show that, had the defendant not been negligent, there was a greater than fifty percent chance of survival or a better result. [*Wickens, supra*, 242 Mich App 391-392.]

I find the construction of the statute articulated by this Court in *Wickens* superior to the construction advanced by the majority here.

III. Application

As an initial matter, I would reject defendants' argument that plaintiff was required to show that defendants' alleged malpractice more probably than not caused Fulton's death.[6] Defendants' argument misapprehends the nature of plaintiff 's claim. It is true that a living person may not recover for the loss of an opportunity to survive. *Wickens, supra*, 465 Mich 54. However, that does not mean that the *injury* that a loss of opportunity to survive claim is designed to compensate is the person's *death*. Rather, the injury is the loss of an opportunity to survive. As our Supreme Court stated in *Falcon, supra* at 461, "[w]e thus see the injury resulting from medical malpractice as not only, or necessarily, physical harm, but also as including the loss

[6] The majority opinion does not address this portion of defendants' argument.

of opportunity of avoiding physical harm."[7] Therefore, I would conclude that plaintiff was not required to prove that defendants' alleged malpractice more probably than not caused Fulton's death.

Defendants also argue that plaintiff's expert witness testimony failed to raise a genuine issue of material fact regarding causation, sufficient to satisfy MCL 600.2912a(2). I disagree. At his deposition, Dr. Taylor opined that, in February 1995, Fulton was suffering from early invasive cervical cancer. Dr. Taylor testified that the survival rate for early invasive cervical cancer patients in February 1995 was eighty-five percent. Dr. Taylor further testified that Fulton's survival rate would not have changed significantly between February and June 1995, the earliest date when Fulton could have undergone surgery. Given Fulton's December 1995 diagnosis of stage IIB cervical cancer, Dr. Taylor testified that her survival rate had dropped to sixty or sixty-five percent, because of the ten-month delay in diagnosis and the seven-month delay in treatment.

Dr. Taylor conceded that he could not state, within a reasonable degree of medical certainty, the exact date on which Fulton's cancer progressed to stage IIB. Further, he could not definitively rule out the possibility that Fulton's cancer had already progressed to that stage in February or June 1995. However, he did testify that it was impossible to know the exact progression of Fulton's disease only because of defendants' failure to diagnose it and their resultant failure to perform the appropriate tests. Dr. Taylor did opine, on the basis of Dr. Eldridge's clinical observations, that Fulton's cancer was probably in its early stages in February 1995. Dr. Taylor also repeatedly opined that an earlier diagnosis of Fulton's cancer would have led to an increased chance of survival.

Therefore, plaintiff presented expert testimony that Fulton's opportunity to survive, before defendants' alleged malpractice, exceeded fifty percent. Plaintiff also presented expert testimony that defendants' alleged malpractice decreased Fulton's opportunity to survive by approximately twenty to twenty-five percent. Given this testimony, I would conclude that plaintiff provided sufficient evidence to state a claim for loss of an opportunity to survive, under MCL 600.2912a(2).

I find no merit in defendants' argument that Dr. Taylor's affidavit contradicts his deposition testimony and that the trial court therefore erroneously denied their motion for summary disposition. Defendants contend that Dr. Taylor's opinion that Fulton had an eighty-five percent chance of survival before defendants' alleged malpractice appears only in his affidavit, and that Dr. Taylor never testified at his deposition that Fulton would have had a better than fifty percent opportunity to survive if her cervical cancer had been timely and properly diagnosed. Contending that Dr. Taylor's affidavit squarely contradicts his deposition testimony,

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[7] As further explained by our Supreme Court in *Weymers*, *supra* at 653, a cause of action does not exist for the loss of an opportunity to avoid physical harm less than death, but only for the loss of an opportunity to avoid death.

defendants argue that the trial court was required to grant defendants' motion for summary disposition under *Dykes v William Beaumont Hosp*, 246 Mich App 471; 633 NW2d 440 (2001). I disagree.

In *Dykes*, the plaintiff's medical malpractice claim was premised on the theory that the decedent more probably than not would have survived absent the defendant's alleged malpractice. *Id*. at 477. The plaintiff's sole expert witness stated in an affidavit that the decedent would have enjoyed more than a fifty percent chance of survival if the defendant had followed the appropriate standard of care. *Id*. Therefore, the expert's affidavit concluded that the defendant's violation of the standard of care proximately caused the decedent's damages. *Id*. However, at his deposition, the expert could not offer an opinion regarding the decedent's life expectancy had the recommended treatment been given. Further, the expert acknowledged that it was impossible to state whether the recommended treatment would have made a difference in the outcome or prolonged the decedent's life. *Id*. at 479.

On appeal, this Court concluded that a party could not create a genuine issue of material fact "'by relying on an affidavit when unfavorable deposition testimony shows that the assertion in the affidavit is unfounded.'" *Id*. at 481, quoting *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). Because the deposition testimony of the plaintiff's expert witness directly contradicted his affidavit regarding the issue of causation, this Court concluded that the requisite causal link between the defendant's conduct and the decedent's life expectancy had not been established and that the trial court properly granted summary disposition. *Dkyes*, *supra* at 478-479.

In the present case, the trial court expressly found that Dr. Taylor's affidavit did not contradict his deposition testimony. My reading of the record convinces me that the trial court was correct on this point. In both his deposition testimony and his affidavit, Dr. Taylor opined that (1) Fulton's opportunity to survive the cancer, before defendants' alleged malpractice, was approximately eighty-five percent, (2) Fulton's opportunity to survive the cancer, when it was finally diagnosed, was approximately sixty to sixty-five percent, and (3) defendants' failure to timely and properly diagnose Fulton's cancer caused Fulton a loss of approximately twenty to twenty-five percent chance of survival. Viewing the affidavits, depositions, and documentary evidence in the light most favorable to plaintiff, I would conclude that Dr. Taylor's deposition testimony was consistent with his affidavit. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Thus, defendants' argument on this point is without merit.

Finally, defendants argue that Dr. Taylor's testimony regarding survival rates in cervical cancer cases did not apply to Fulton's individual chances of survival. As defendants argue: "these statistics do not apply to Mrs. Fulton, whose cancer proved to be incurable." Again, defendants' argument is without merit. The fact that Fulton failed to survive the cervical cancer does not mean that the survival statistics set forth by Dr. Taylor did not apply to her. Rather, Fulton's death is consistent with a finding that she fell within that group of thirty-five to forty percent of cervical cancer patients who will not survive after a diagnosis of stage IIB cancer. Fulton's death does not change the expert witness testimony submitted by plaintiff that

defendants' alleged malpractice reduced Fulton's chance of surviving the cervical cancer from eighty-five percent to sixty or sixty-five percent.[8]

I would affirm the trial court's order denying defendants' motion for summary disposition.

/s/ Michael R. Smolenski

[8] Furthermore, defendants' arguments are internally inconsistent. On the one hand, defendants argue that, in order to bring a claim for loss of an opportunity to survive, a plaintiff must demonstrate that the defendants' alleged malpractice more probably than not caused the patient's death. On the other hand, defendants argue that general statistics regarding survival rates cannot apply to patients who die. Our Supreme Court has clearly held that a patient must have died before a valid claim for loss of an opportunity to survive can be stated. Defendants' argument, if accepted, would preclude all plaintiffs bringing this type of claim from presenting evidence that a particular patient had a greater than fifty percent chance of survival. By extension, defendants' argument would preclude all claims for loss of an opportunity to survive. I cannot conclude that such an argument is viable in light of MCL 600.2912a(2), which expressly permits plaintiffs in medical malpractice actions to bring claims for loss of an opportunity to survive where the opportunity was greater than fifty percent.